

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WARREN HILL, LLC,

Plaintiff,

v.

SFR EQUITIES, LLC,

Defendant.

No. 2:18-01228-HB

**PLAINTIFF WARREN HILL, LLC'S RESPONSE TO
DEFENDANT SFR EQUITIES, LLC'S STATEMENT OF UNDISPUTED FACTS**

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Dated: December 21, 2018

Counsel for Plaintiff Warren Hill, LLC

Plaintiff Warren Hill, LLC (“Warren Hill”), through its undersigned counsel, hereby responds to the Statement of alleged Undisputed Facts that Defendant SFR Equities, LLC (“SFR”) filed in support of its Motion for Partial Summary Judgment. The Court’s policies do not expressly call for a separate Statement of Facts, which SFR nevertheless filed in connection with its Motion. In an effort to preserve its rights, and to avoid any impression that SFR’s Statement of Facts is “undisputed” for purposes of Rule 56, Warren Hill has prepared the following responses with specific citation to the record.¹

RESPONSE TO SFR’S STATEMENT OF ALLEGED FACTS

1. [REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted.

2. [REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that AHG created SFR to serve as the entity that purchased Warren Hill’s interest in Vendor Assistance Program, LLC. Discovery is ongoing and Warren Hill lacks knowledge concerning, and therefore disputes, whether [REDACTED] have been created to manage companies that are not relevant to this case.

¹ Warren Hill reviewed the Court’s published decisions in connection with responding to SFR’s separately filed Statement of Facts. Warren Hill located only a few such decisions where the Court appeared to consider a separate factual statement and corresponding response. *See A.G. v. Lower Merion Sch. Dist.*, 2012 U.S. Dist. LEXIS 140250, at *26 n.10 (E.D. Pa. Sep. 28, 2012); *Hlywiak v. AMTRAK*, 223 F. Supp. 3d 395, 396 n.2 (E.D. Pa. 2016); *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 752 n.1 (E.D. Pa. 2011). While these cases appear to represent the minority of the Court’s summary judgment opinions, Warren Hill wanted to provide an appropriate response to SFR’s statement for the Court’s consideration.

3. [REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED] (See Ex. 1, Member Interest Purchase Agreement at C-1 (guaranty of payment to Warren Hill of \$1 million signed by Mr. Ginsburg, not Mr. Harris).) At this stage, therefore, Warren Hill disputes [REDACTED]

[REDACTED].²

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. By way of further response: (1)

Warren Hill agrees that VAP is a specialty finance company; (2) [REDACTED]

[REDACTED]

[REDACTED] and (3) while Warren Hill was unaware at the time [REDACTED],

[REDACTED]

² The parties had been negotiating [REDACTED], with SFR suggesting that [REDACTED]. Warren Hill is considering that proposal.

[REDACTED] (*see* Ex. 5, Harris Dep. at 58:2-59:24.) Warren Hill lacks knowledge concerning, and therefore disputes, [REDACTED].

Discovery is ongoing in this case, and Warren Hill will supplement this response if/when new documents or testimony address the issue.

5. [REDACTED]

[REDACTED].

RESPONSE: Admitted.

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that negotiations between the parties began in 2015 and continued until February 2016. Warren Hill further admits that it was represented by Mr. Delaney and counsel in connection with the negotiations. Warren Hill admits that the negotiations resulted in the MIPA. Warren Hill disputes that the negotiations [REDACTED] as the parties were negotiating. (*See* Ex. 2, Declaration of Jim Delaney (“Delaney Decl.”) ¶¶ 28-40 (explaining complex nature of the detailed negotiations).)

7. [REDACTED]

[REDACTED].

RESPONSE: Admitted.

8. [REDACTED]

[REDACTED]
[REDACTED].

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that the MIPA includes Section 1.2(d), which the parties have referred to as the earnout provision. Warren Hill disputes SFR’s characterization of the contents of that provision. Section 1.2(d) bases the earnout payments on the definition of “Net Income”, which itself is broken down into “Revenue” and “Expenses,” both of which are specifically defined terms. The “Revenue” to be included in the earnout payment encompasses, *inter alia*, “any and all fees earned by VAP in its capacity as a manager or an administrator” of trusts relating to the business at issue and “any and all other revenues received by VAP other than the Reserve Amounts,” which were separately defined and accounted for in Section 1.2(e). (*See* Ex. 1, MIPA at § 1.2(d)(i)(A), (D) (emphases added); *compare id.* to § 1.2(e) (addressing “Reserve Amounts”).) Thus, the specifically negotiated definition of “Revenue,” which is the backbone of the earnout provision, explicitly includes fees earned (which fees may not necessarily be paid to VAP in the form of cash until sometime after they have been earned), as well as other revenue that was received by VAP during the years in question. (*See* Ex. 1, MIPA at § 1.2(d)(i)(A), (D).)

9. [REDACTED]

[REDACTED]

RESPONSE: Admitted.

10. [REDACTED]

[REDACTED]

RESPONSE: Admitted.

11. [REDACTED]

[REDACTED]

RESPONSE: Admitted. By way of further response, SFR principal Gene Harris testified [REDACTED]. (Ex. 5, Harris Dep. at 138:8-139:20, 189:11-22.)

12. [REDACTED]

[REDACTED].

RESPONSE: Disputed. Schedule 1.2(d) is a component of the MIPA, which was the product of negotiation between SFR and Warren Hill. (Ex. 2, Delaney Decl. ¶¶ 28-40.)

[REDACTED]. (See Ex. 5, Harris Dep. at 128:15-130:20; Ex. 29 ([REDACTED]). [REDACTED] [REDACTED] (Ex. 5, Harris Dep. at 138:8-139:20, 189:11-22.)

13. [REDACTED]

[REDACTED].

RESPONSE: Disputed. SFR has misquoted Schedule 1.2(d) in a material way. The actual Schedule reads “Income ‘**when received**’” and “Expenses ‘**when paid**.’” (Emphasis added to denote phrases actually in quotation marks.) As set forth in Warren Hill’s responsive brief, this is a factually and legally significant distinction, as the placement of the quotation marks signifies that the terms “when received” and “when paid” carry a specific connotation under the terms of the agreement. (See Warren Hill Br. at Argument § II.B.) Moreover,

Schedule 1.2(d) is not calculated on a “cash” basis—rather, Section 1.2(d) features a formula that is a hybrid of accrual-based and cash-based elements. (*See* Warren Hill Br. at Argument § I.A-C (detailing relevant terms of MIPA, including Schedule 1.2(d).))

14. [REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Disputed. In the run-up to the first earnout payment, Warren Hill sought information about VAP’s financial performance from Mr. Reape, who provided Warren Hill with a limited amount of information. (Ex. 2, Delaney Decl. ¶¶ 41-42.) Mr. Reape subsequently informed Warren Hill that his business partners were upset with him for having shared that information. (*Id.* ¶ 44.) Warren Hill used that limited information to create a spreadsheet relating to 2016 and shared that spreadsheet with SFR. (*Id.* ¶ 43.) When SFR responded to the spreadsheet, it provided comments relating to expenses that it planned to deduct when calculating the first earnout payment, but SFR did not supplement the spreadsheet with VAP’s earned fees to the extent they were not already listed in the spreadsheet. (*Id.* ¶ 45.) During the following weeks, SFR and Warren Hill corresponded about SFR’s stated intentions (from which it ultimately relented) to take ineligible deductions for amounts relating to purported expenses that were not permitted to be included in the earnout calculation. (*Id.* ¶ 47.) At no time during this correspondence did Warren Hill ever agree that earned but unpaid fees would be excluded from “Revenue”, as defined in Section 1.2(d), or that the formula set forth in Section 1.2(d), which includes both cash and accrual concepts, was instead calculable on a strictly cash accounting basis. (*Id.* ¶ 35-40.)

Warren Hill further disputes that SFR based the earnout on “cash income,” [REDACTED]

[REDACTED]

[REDACTED] (*Compare* Ex. 23 with Ex. 8, [REDACTED]

[REDACTED]

[REDACTED]; Ex. 3, Reape Dep. at 170:18-173:13 ([REDACTED]

[REDACTED] *see also id.* at 154:7-159:20 ([REDACTED]

[REDACTED].)

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Disputed. Warren Hill incorporates its response to Paragraph 14 as though set forth fully herein.

16. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED].

RESPONSE: Disputed. Warren Hill incorporates its response to Paragraph 14 as though set forth fully herein. By way of further response, the operating expenses used to calculate the 2016 earnout were based on the predefined, fixed operating expense allowances set forth in Section 1.2(d)(ii), not on VAP's actual cash operating expenses [REDACTED]. (Ex. 1, MIPA § 1.2(d)(ii)(A)-(B).)

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that Mr. Hynes was a founder of VAP in or around 2010, that [REDACTED], and that CHGO is a member of VAP. Warren Hill disputes that Mr. Hynes has been [REDACTED]. From 2012 through Warren Hill's sale of its interest in VAP, the operational day-to-day role was handled primarily by Mr. David Reape and/or Mr. Jason Cannon. (Ex. 2, Delaney Decl. ¶ 17.) [REDACTED]. (Ex. 6, Compare Ex. 30 [REDACTED] [REDACTED]) with Ex. 6, Hynes Dep. at 77:9-13 ([REDACTED])

18. [REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed at this stage in part. Warren Hill admits that Mr. Hynes is a lobbyist in Illinois, that he has many political ties within Chicago politics, that he is an attorney at Howard & Howard, and that he described himself as a businessman. At this stage, Warren Hill lacks information sufficient to determine whether Mr. Hynes "[REDACTED]". While [REDACTED], it is unclear at this stage of discovery whether [REDACTED].

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that [REDACTED]

[REDACTED]

[REDACTED].

Warren Hill disputes that [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Ex. 5, Harris Dep. at 67:13-21.) [REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]. (*Id.* at 68:5-8.) [REDACTED]

[REDACTED]. (*Id.* at 68:9-17; Ex. 31, [REDACTED]

[REDACTED]. [REDACTED]. (Ex. 5, Harris Dep. at 68:18-21.)

[REDACTED]

[REDACTED]. (*Id.*, at 68:22-25.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 67:13-21, 68:5-25, 209.) [REDACTED]

[REDACTED],

[REDACTED]

[REDACTED]. (Ex. 32, [REDACTED])

[REDACTED] Mr. Harris conceded that [REDACTED].” (Ex.

5, Harris Dep. at 69:12-70:19.)

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part, including as to the legal conclusions embedded in the alleged “fact.” [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Warren Hill lacks knowledge concerning, and therefore disputes, the timing of when

[REDACTED]. There is no contemporaneous

evidence supporting the assertion of when [REDACTED]

[REDACTED] The only written evidence on the issue was [REDACTED]

[REDACTED]

[REDACTED].

(See Ex. 3, Reape Dep. at 214:6-215:9; *see also* Ex. 33 [REDACTED]

[REDACTED]

21. [REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Disputed, including as to the legal conclusions contained therein (*i.e.*, the conclusion that [REDACTED]). Warren Hill (1) disputes

[REDACTED]

[REDACTED]

[REDACTED].

As to the first point, the new risk retention requirements did not, as a matter of law,

[REDACTED], and SFR proffers no argument in its Statement of Facts or Memorandum of Law to suggest otherwise. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (*See,*

e.g., SFR's Motion at Mr. Hynes Declaration at Ex. F, [REDACTED] at 4, 6 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As to the second point, Warren Hill has adduced substantial evidence already (even though discovery is still ongoing) to show that [REDACTED]

[REDACTED]

[REDACTED]. Specifically:

(1) [REDACTED]

[REDACTED] (See Ex. 5, Harris Dep. at 197:10-17, 199:23-200:1; Ex. 3, Reape Dep. at 210:16-211:16.)

(2) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 5, Harris Dep. at 197:10-25; *see also* Ex. 31, [REDACTED]

[REDACTED]);

(3) [REDACTED]

[REDACTED]

[REDACTED] (Ex. 21 ([REDACTED]

[REDACTED]); Ex. 30 (same)) ;

(4) [REDACTED]

[REDACTED] (Ex. 21 ([REDACTED]

[REDACTED]));

(5) [REDACTED]

[REDACTED]

[REDACTED], (*id.*);

(6) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 3, Reape Dep. at 287:18-288:14; Ex. 4, Wilson Dep. at 175:4-

177:21; Ex 30 ([REDACTED]

[REDACTED]); Ex. 34 [REDACTED]

[REDACTED])

(7) [REDACTED]

[REDACTED]

[REDACTED]

(Ex. 22 ([REDACTED]); Ex.6, Hynes Dep. at 77:9-13);

(8) [REDACTED]

[REDACTED]

[REDACTED] (Ex. 3, Reape Dep. at 202:15-

23; Ex. 4, Wilson Dep. at 65:15-66:10, 71:23; Ex. 5 Harris Dep. at 231:18-233:8.)

(9) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*see* Warren Hill

Resp. to ¶ 30, *infra*);

(10) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 3, Reape Dep. at 136:15-20); and

(11) [REDACTED]

[REDACTED] (Ex. 27, [REDACTED])

Discovery is still ongoing, and additional documents have been sought from SFR that Warren Hill expects will further confirm that [REDACTED]

[REDACTED]

[REDACTED].

22. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Admitted. By way of further response, [REDACTED]

[REDACTED]

[REDACTED] (Ex. 2, Delaney Decl. ¶¶ 41-42.)

23. [REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See* Warren Hill Br. at Argument § I.C).

24. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED]. Warren

Hill disputes that [REDACTED], for the reasons Warren Hill articulates

in its responses to Paragraphs 21- 23 and 30, which responses Warren Hill incorporates herein.

25. [REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED]. Warren Hill disputes that [REDACTED]

[REDACTED], for the reasons Warren Hill articulates in its responses to

Paragraphs 21-23, and 30, which responses Warren Hill incorporates herein.

26. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].”

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” (Ex. 3, Reape Dep. at 273:20-277:7.) [REDACTED]

[REDACTED]

[REDACTED] (Ex. 5, Harris Dep. at 167:6-9; Ex. 21 ([REDACTED]

[REDACTED].) [REDACTED]

[REDACTED]

[REDACTED] (Dkt. No. 38, [REDACTED].) [REDACTED]

[REDACTED]

[REDACTED] (*Compare id. with* Ex. 36-37 ([REDACTED]

[REDACTED]).)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Ex. 36.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* [REDACTED]); *see also* Ex. 37 ([REDACTED])

[REDACTED] [REDACTED] n. (*Id.*; *see also* Ex. 4, Wilson Dep. at 257:6-9 ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED].) [REDACTED]

[REDACTED]

[REDACTED] (Ex. 5, Harris Dep. at 322:22-323:2) [REDACTED]

[REDACTED]

[REDACTED] (Ex. 4, Wilson Dep. at 258:8-12). [REDACTED]

[REDACTED] (*Id.* at 257:6-16.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (*See* Warren Hill Br. at Argument § I.B.2.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

27. [REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See* Warren Hill Br. § I.C.)

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”

RESPONSE: Admitted.

29. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30.

_____ alter SFR's obligations under the MIPA.

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 3, Reape Dep. at 119:23-121:16, 170:18-173:13, 180:21-181:19.)

In summary, under this supposed [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED] (Ex. 5, Harris Dep. at 205:6-207:20.) [REDACTED]

[REDACTED] (Ex. 3, Reape Dep. at 136:15-20.) [REDACTED]

[REDACTED]. (Ex. 5, Harris Dep. at 210:19-212:7.)

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED].

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

RESPONSE: Admitted in part; disputed in part. [REDACTED]

[REDACTED] Warren Hill disputes that [REDACTED]
[REDACTED] because (1) VAP's disclosures to the State of Illinois indicate that VAP
[REDACTED]
[REDACTED] (VAP Disclosures,³ at 97 (representing [REDACTED]
[REDACTED] (2) [REDACTED]
[REDACTED]
[REDACTED] (Warren Hill Br. § I.B.2), and (3)
Warren Hill contends that VAP, BSF, and BCM are [REDACTED]
[REDACTED] (*id.* § I.C).

32. [REDACTED]
[REDACTED]

³ These disclosures were used as Warren Hill Deposition Exhibits 96 and 97, but due to their volume, Warren Hill directs the Court to the online version. (Ex. 5, Harris Dep. at 100:22-101:17); Illinois Comptroller Website, VAP Disclosures, *available at* https://illinoiscomptroller.gov/comptroller/assets/File/QualifiedPurchaserMonthlyReports/2018/October/VendorAssistanceProgramLLC_October%202018.pdf. Warren Hill will provide a hard copy if the Court would prefer.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that various VAP and AHG personnel [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Dkt. No. 38, [REDACTED]) and (2) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 21 [REDACTED]), Ex. 34 ([REDACTED])

[REDACTED] Ex. 40 ([REDACTED]); Ex. 41

[REDACTED]) Any business

conducted by BSF during this period could not have been “[REDACTED]

[REDACTED]. (*Id.*)

Moreover, Warren Hill disputes that BSF was [REDACTED] for the reasons Warren Hill articulates in its response to Paragraph 31, which response Warren Hill incorporates herein.

[REDACTED]

[REDACTED]

[REDACTED]. (Ex. 3, Reape Dep, at 119:23-121:16, 170:18-173:13, 180:21-181:19.)

In addition, Warren Hill disputes that “[REDACTED]
[REDACTED] for the reasons Warren Hill articulates in its response to Paras. 21- 23, and 30,
which responses Warren Hill incorporates herein.

33. [REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that BSF and BCM
were each formed as limited liability companies. Warren Hill lacks knowledge concerning, and
therefore disputes, [REDACTED]

[REDACTED].

34. [REDACTED]

[REDACTED]

[REDACTED].

RESPONSE: Admitted in part; disputed in part. [REDACTED]
[REDACTED] which payment SFR claims to represent the
2017 earn out. [REDACTED]
[REDACTED]. Warren Hill disputes the sufficiency of
such payment under the terms of the MIPA as well as the methods by which SFR apparently
calculated such payment.

Respectfully submitted,

/s/ Gregory S. Voshell

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Dated: December 21, 2018

Counsel for Plaintiff Warren Hill, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, I have caused a true and correct copy of the forgoing to be served upon each attorney of record via electronic mail, the Court's ECF system, and U.S. mail.

/s/ Gregory S. Voshell
GREGORY S. VOSHELL

Dated: December 21, 2018